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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,
Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,
Respondents.

BRIEF FOR PETITIONER.

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Respondents.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This case comes to this Court on a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court modifying and affirming, as modified, an order made for the allowance of compensation to respondents by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding under the Bankruptcy Act for the corporate reorganization of petitioner.

The appellate jurisdiction of the Court of Appeals to review and modify the order of the District Court was exercised upon an appeal from the order which the Court of Appeals allowed to respondents. The Court of Appeals denied petitioner's motion to dismiss the appeal, and, after a hearing, increased respondents' compensation from $2,000 to $10,000. The basis of petitioner's motion to dismiss the appeal was, and its contention here is, that more than $500 being involved in the order, an appeal therefrom could have been taken only in the District Court, and not having been so taken, the attempted appeal must be dismissed for want of jurisdiction, the jurisdiction of the Court of Appeals over the allowance of appeals being limited to orders involving less than $500. Ruling adversely to this contention, the Court of Appeals held that the order was appealable only upon allowance by the appellate court.

REFERENCE TO OPINIONS BELOW.

The Court of Appeals filed two opinions. The first was filed May 22, 1939, and the second, on petition for rehearing, was filed June 24, 1939. These opinions are reported in 104 F. (2d) 771, and appear in the record at p. 48, *et seq.*, and p. 58, *et seq.*

STATEMENT AS TO JURISDICTION.

The decree of the Court of Appeals, affirming, as modified, the order of the District Court, was entered May 22, 1939 (R. 57). Petitioner's petition for rehearing in the Court of Appeals was denied June 24, 1939 (R. 60). Petition for certiorari was filed in this Court September 14, 1939, and was granted November 6, 1939. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

On June 13, 1934, a creditors' petition for the reorganization of petitioner under Section 77B of the Bankruptcy Act was filed in the District Court (R. 1). This petition, as subsequently amended, and petitioner's answer thereto, were approved by the District Court on September 10, 1934 (R. 10). On February 23, 1938, the District Court confirmed a plan of reorganization (R. 16).

Thereafter, respondents and others filed petitions for the allowance of compensation and reimbursement for expenses. Respondents are a bondholders Committee, which was organized during the pendency of the proceeding under a Deposit Agreement dated August 1, 1934, and as such Committee came eventually to represent approximately 70% of the outstanding real estate bonds issued by petitioner (R. 36). In their petition, respondents requested an allowance of $20,000 for compensation to them for their services in the reorganization (R. 40, 41, 59). These petitions were referred to a Special Master, who took testimony and reported (R. 26). On October 26, 1938, the District Court ordered allowances of compensation and reimbursement to the various applicants (R. 26). Respondents were allowed $2,000 of the $20,000 requested by them (R. 26).

On November 25, 1938, respondents filed their petition in the Court of Appeals asking that leave be granted to them to appeal from the order of October 26, 1938, fixing their compensation at $2,000 (R. 34). With their petition respondents filed an assignment of error (R. 40). The following day respondents served petitioner with copies of these papers together with notice that the originals thereof had been filed in the Court of Appeals on the previous day (R. 41).

On December 5, 1938, petitioner filed in the District

Court a notice of appeal from the order of October 26, 1938, with respect to allowances of compensation to certain other applicants (R. 28). This appeal was later docketed in the Court of Appeals as Cause No. 6842, and is referred to by the Court of Appeals in its present opinion (R. 48). On the same day, December 5, 1938, petitioner filed in the Court of Appeals its petition asking that leave be granted to it to appeal from the order of October 26, 1938, with respect to the allowances of compensation made to these applicants (R. 49). This petition was docketed in the Court of Appeals as Cause No. 6822, and is also referred to by the Court of Appeals in its present opinion (R. 49, 50).

On December 13, 1938, the Court of Appeals allowed an appeal to respondents from the order of October 26, 1938 (R. 42). On December 19, 1938, the Court of Appeals denied petitioner's petition for the allowance of an appeal from this order (R. 49), the Court being of the opinion that it had no jurisdiction to allow the appeal.

The Court of Appeals thereafter approved the appeal bond filed by respondents, as required by the order allowing the appeal, and issued a citation to petitioner which was duly served by respondents and filed December 28, 1938 (R. 42). On January 10, 1939, petitioner filed its motion in the Court of Appeals to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction to allow or entertain the appeal (R. 43). After briefs had been filed, the Court of Appeals continued the motion to the hearing on the merits (R. 44).

Controversies over the allowances made by the District Court then existing between petitioner and the appellees in Cause No. 6842, excepting the controversy with the appellee, Glenn, Real & Browning, were settled during the pendency of the appeal and prior to the hearing before the Court of Appeals (R. 48).

By order of the Court of Appeals the instant case was heard with Cause No. 6842 on the original papers which had been transmitted by the clerk of the District Court and filed by petitioner as the record in the latter cause (R. 67). At the hearing the Court of Appeals affirmed, in Cause No. 6842, the order of the District Court as to the allowance made to Glenn, Real & Browning (R. 48) and took under advisement petitioner's motion to dismiss respondents' appeal (R. 47).

The Court of Appeals thereafter, on May 22, 1939, denied petitioner's motion to dismiss the appeal (R. 47), and, at the same time, modified the order of the District Court by increasing respondents' allowance from $2,000 to $10,000, and affirmed the order as so modified (R. 57).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In allowing an appeal to respondents from the order of the District Court, when the amount involved in the order was more than $500.

(2) In denying petitioner's motion to dismiss the appeal.

(3) In holding that it had jurisdiction to allow the appeal.

(4) In reviewing the order of the District Court upon the appeal which it had allowed.

(5) In construing the Chandler Act to permit appeals from orders making or refusing to make allowance of compensation or reimbursement for expenses to be taken only upon allowance by the appellate court.

(6) In modifying and in affirming, as modified, the order of the District Court.

SUMMARY OF ARGUMENT.

I.

An appeal from the order of October 26, 1938, is governed by the Chandler Act amendments which became effective September 22, 1938, more than one month prior to the entry of the order. Appeals from orders in proceedings under Section 77B of Chapter VIII of the Bankruptcy Act are not authorized except as provision has been made for appeals by Sections 24 and 25 of Chapter IV of the Bankruptcy Act. Former Sections 24 and 25 are not continued in force as to orders to which the application of Sections 24 and 25 of the Chandler Act is "practicable". The practicability of applying Sections 24 and 25 of the Chandler Act is not a matter of judicial discretion to be exercised by the District Court under Section 276c(2) of the Chandler Act, but is a matter which must be judicially determined under Section 6b of the amendatory act by the appellate court whose jurisdiction is sought to be invoked. Obviously, the application of Sections 24 and 25 of the Chandler Act to the order of October 26, 1938, was entirely "practicable", and the appeal from the order was, therefore, governed by the provision made for appeals by these Sections of the Chandler Act. (*London* v. *O'Dougherty*, 102 F. (2d) 524.) There is no question here of the retroactive application of the Chandler Act or of disturbing vested rights.

II.

The Court of Appeals had no jurisdiction to allow an appeal from the order of October 26, 1938. Section 24 of the Chandler Act confers jurisdiction upon the circuit courts of appeals to allow appeals from orders of the bank-

ruptcy courts, and, at the same time, limit this jurisdiction to orders, decrees or judgments which involve less than $500. This limited jurisdiction is not confined to the liquidation provisions of the Chandler Act (Chapters I to VII), but applies generally to all orders, decrees or judgments of the bankruptcy courts of this class. Sections 250 of the Chandler Act does not enlarge, restrict, or in any manner modify the appellate jurisdiction vested in the circuit courts of appeals by Section 24, or nullify this limitation. Section 250 incorporates Sections 24 and 25. (*London* v. *O'Dougherty*, 102 F. (2d) 524.) The construction of the Chandler Act by the Court of Appeals contravenes well-recognized rules of construction and violates, not only positive provisions of the Chandler Act, but also its policy and spirit. Under the Bankruptcy Act, prior to the Chandler Act amendments, the method and scope of review were made to depend upon the character of the proceedings. Under the Chandler Act amendments the scope of review is made uniform in all cases and the method of appeal is no longer made to depend upon the character of the proceedings, but depends solely upon the amount involved. The language contained in Section 250 cannot be so construed as to ascribe to Congress an intent to retain the distinctions which formerly governed appeals from the orders of the bankruptcy courts.

The construction placed upon Section 250 by the Court of Appeals does not further a more expeditious administration. But even if this were so, the same argument would apply with even greater force to all orders of the bankruptcy court entered in what are strictly "proceedings in bankruptcy". There is nothing contained in the Chandler Act which would indicate an intent to expedite the proceedings by restricting appeals.

III.

The appeal from the order involved in this case could have been taken only in the District Court, and not having been so taken, the Court of Appeals should have dismissed the attempted appeal for want of jurisdiction to entertain it. The Court of Appeals has no discretion to entertain an appeal which has not been taken in the manner authorized by law.

Formerly appeals were taken in the District Court upon allowance, but are now taken by the filing of a notice of appeal in the District Court. Respondents neither secured the allowance of an appeal in the District Court nor filed a notice of appeal in the District Court.

It is doubtful whether respondents' petition for leave to appeal can be construed as a notice of appeal. But even if it should be so construed, it was not filed in the District Court but in the Court of Appeals. To permit a notice of appeal to be filed in a court other than the District Court in which the judgment was rendered would lead to endless confusion, and, certainly, such practice is neither contemplated nor authorized by the Rules of Civil Procedure. Under the Rules of Civil Procedure the filing of the notice of appeal in the District Court is the effective act by which the appellate jurisdiction of the Circuit Court of Appeals is invoked. Notification of the filing of the notice of appeals is not jurisdictional, but merely procedural. Notification to the parties that an appeal has been, or is about to be, taken from a judgment of the District Court cannot be substituted for the filing of a notice of appeal in the District Court within the time prescribed by law.

The express provisions of the Chandler Act, or of the Rules of Civil Procedure, cannot be dispensed with on equitable grounds.

IV.

The merits of the controversy which existed between respondents and petitioners in the courts below are not presented to this Court for review. Petitioner does not admit the justice of the allowance made to respondents by the Court of Appeals, and states that the conclusions reached by the Court of Appeals are based upon a misapprehension of the facts, particularly with reference to what it termed "the outstanding advantages of the plan" and the services rendered by respondents in connection with these supposed "outstanding advantages".

ARGUMENT.

I.

AN APPEAL FROM THE ORDER OF OCTOBER 26, 1938, IS GOVERNED BY THE CHANDLER ACT AMENDMENTS, WHICH BECAME EFFECTIVE SEPTEMBER 22, 1938.

The order from which respondents secured the allowance of an appeal by the Court of Appeals was entered by the District Court on October 26, 1938, which was more than one month after September 22, 1938, the date on which the Act of June 22, 1938, (Chap. 575, 52 Stat. 840-940), amendatory of the Bankruptcy Act of 1898, became effective (52 Stat. 940). The amendatory Act of June 22, 1938, is commonly called the "Chandler Act."[1]

The provisions of the Chandler Act relating to appeals and the appellate jurisdiction of the circuit courts of appeals are, so far as pertinent here, as follows:

Section 24 (52 Stat. 854; 11 U. S. C. A. Sec. 47):

> "SEC. 24. *Jurisdiction of appellate courts.* a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy.

[1] Section 1 of the amendatory Act contains chapters I to VII and X to XIV (both inclusive) of the Bankruptcy Act of 1898, as amended by the amendatory Act. Sections 2 and 3 are not applicable to matters embodied in Section 1. Sections 4 to 7 inclusive deal with the amendments contained in Section 1. To distinguish section numbers in Section 1 from the correspondingly numbered sections of the amendatory Act and of the Bankruptcy Act of 1898 in force prior to the effective date of the amendatory Act, Section 1 of the amendatory Act is herein referred to as the "Chandler Act."

either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 25 (52 Stat. 855; 11 U. S. C. A. Sec. 48):

"SEC. 25. *Practice on appeals.* a. Appeals under this Act to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

Section 250 (52 Stat. 901; 11 U. S. C. A. Sec. 650):

"SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Prior to the Chandler Act amendments, the provisions of the Bankruptcy Act relating to appeals and the appellate jurisdiction of the circuit courts of appeals, so far as pertinent here, read as follows:

Section 24 (11 U. S. C. Sec. 47):

"47. *Same; appellate jurisdiction.* (a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and dur-

ing their respective terms, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court.

(c) All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered."

Section 25 (11 U. S. C. Sec. 48):

"48. *Appeals and writs of error.* (a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

Section 77B (c) (9) (11 U. S. C. A. Sec. 207 (c) (9)):

"(c) Upon approving the petition or answer or at any time thereafter, the judge * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan * * * but appeals from orders fix-

ing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

Section 4 of the amendatory Act of June 22, 1938 (52 Stat. 940), so far as pertinent here, is as follows:

"Except to the extent necessary to give effect to the provisions of section 6 of this amendatory Act, all Acts or parts of Act inconsistent with any provisions of this amendatory Act, are hereby repealed."

Section 6b of the amendatory Act of June 22, 1938 (52 Stat. 940) is as follows:

"Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Section 7 of the amendatory Act of June 22, 1938 (52 Stat. 940) is as follows:

"This amendatory Act shall take effect and be in force on and after three months from the date of its approval.

Approved, June 22, 1938."

Obviously, Section 24 of the Chandler Act is inconsistent with former Section 24. It is also clear that the application of Section 24 of the Chandler Act to appeals from orders entered in pending proceedings after the effective date of the amendatory Act is "practicable" within the meaning of Section 6b of the amendatory Act. It follows, therefore, that former Section 24 was *repealed* on the effective date of the amendatory act by Section 4 of the amendatory Act, at least in respect of appeals from orders thereafter entered.

Section 276c of Chapter X of the Chandler Act (52 Stat. 905; 11 U. S. C. A., Sec. 676c) has no application to appeals. Sub-section c (1) and (2) of Section 276 is as follows:

> "c. The provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—
>
> (1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and
>
> (2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable * * *."

While Section 276c (2) declares that in pending cases the provisions of Chapter X (Corporate Reorganization Section) of the Chandler Act shall apply to the extent that the judge shall deem their application practicable, it seems obvious that this has reference only to the regulations of the proceedings before the District Court[2] after June 22, 1938, the date of the approval of the Act, and not to appeals. Appeals under the Bankruptcy Act, prior to the Chandler Act amendments, were not discretionary with the District Court. They were either taken in the District Court as a matter of right or were allowed

[2] Prior to the Chandler Act amendments, Section 1 (16) (11 U. S. C. Sec. 1 (16)) provided: "'judge' shall mean a judge of a court of bankruptcy, not including the referee." This definition is retained by the Chandler Act (52 Stat. 840; 11 U. S. C. A. Sec. 1 (20)).

by the Court of Appeals in its discretion. (*O'Connor* v. *Mills*, 300 U. S. 26; Cf: *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160.) This is also true under the Chandler Act amendments. Hence, in respect of appeals, it is immaterial whether or to what extent the District Court might deem the Chandler Act applicable to pending proceedings. Section 276c (2) cannot cover appeals.

Appeals from orders in proceedings under Section 77B of Chapter VIII are not authorized except as provision has been made for appeals by Sections 24 and 25 of Chapter IV of the Bankruptcy Act. (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160; *O'Connor* v. *Mills*, 300 U. S. 26). These are the sections which confer appellate jurisdiction upon the circuit courts of appeals and prescribe the mode of review. Moreover, appeals from orders allowing or refusing to allow compensation in proceedings under Section 77B were authorized, not by sub-section (c) (9) of Section 77B but by Section 24(b) (11 U. S. C. 47(b)), to be allowed in the discretion of the appellate court (*Shulman* v. *Hotel Co.*, 301 U. S. 172).[3] Former Sections 24 and 25 were repealed with no other saving clause than that contained in Section 6b of the amendatory Act.

Sections 24 and 25, as amended by the amendatory Act, are Sections 24 and 25 of the Chandler Act. These Sec-

[3] The decisions of the lower federal courts to the same effect are *In Re Wilson-Sheridan Hotel Co.* (C. C. A., 7th Cir.), 86 F. (2d) 898; *Dee* v. *United Exchange Bldg.* (C. C. A. 9th Cir.), 88 F. (2d) 372; *In Re New York Investors* (C. C. A. 2nd Cir.), 79 F. (2d) 179; *In Re Grocery Center* (C C. A. 7th Cir.), 91 F. (2d) 176. In Vol. 3, Gerdes on Corporate Reorganizations (1936), § 1207, p. 1935, the following statement appears:

> "Appeals from orders fixing such allowances may be taken summarily, and independent of other appeals.
>
> This provision does not change the procedure for taking such an appeal; it does not change the substantive rights involved. It merely provides for a summary and separate hearing on the appeal. Authority for the appeal must be found in some other section of the Bankruptcy Act."

tions, the old and the revised, cover the subject of appeals and are inconsistent. In these circumstances, Sections 24 and 25 of the Chandler Act govern appeals from orders to which the application of these Sections is "practicable", and former Sections 24 and 25 govern appeals from orders to which the application of Sections 24 and 25 of the Chandler Act is not "practicable". In other words, only appeals from orders to which Sections 24 and 25 of the Chandler Act are not "applicable" are governed by former Sections 24 and 25. This is the extent, and the full extent, to which Section 6b of the amendatory Act saves former Sections 24 and 25 from outright repeal by Section 4 of the Amendatory Act. Clearly, former Sections 24 and 25 are not continued in force as to orders to which the application of Sections 24 and 25 of the Chandler Act is "practicable" by Section 6b of the amendatory Act, but are repealed by Section 4 of the amendatory Act. In such cases, Section 4, not Section 6b, governs.

Whether former Sections 24 and 25, or Sections 24 and 25 of the Chandler Act, are applicable to an order in a pending proceeding is not a matter of judicial discretion but is a question which must be judicially determined in accordance with the standard of practicability provided by Section 6b of the amendatory Act. Judged by this standard, it is clear that Sections 24 and 25 of the Chandler Act govern the appeal from the order involved in this case.

Respondents apparently contend, first, that the application of Section 24 of the Chandler Act to appeals from orders in pending proceedings entered after the effective date of the amendatory Act is discretionary with the circuit courts of appeals, and, secondly, that the application of Section 24 of the Chandler Act is not "practicable" when the effect of such application is to deprive parties of vested rights.

The answer to the first contention is that the application of Section 24 of the Chandler Act is not discretionary with the circuit courts of appeals; but even if it were otherwise, the Court of Appeals has determined that the appeal from the order involved in this case is governed by the Chandler Act (R. 51).

The answer to the second contention is that no vested right of respondents is impaired or affected by the application of Section 24 of the Chandler Act. Respondents' right to compensation was fixed by the order of October 26, 1938, which was entered more than one month subsequent to the effective date of the amendatory Act. Since the amendatory Act did not take effect until three months after the date of its approval, respondents had ample notice of, and time within which to become familiar with, the provisions of the amendatory Act. There is, therefore, no question here of the retroactive application of the Chandler Act or of disturbing vested rights. Upon a review of this order, respondents would, undoubtedly, be entitled to have their right to compensation determined in accordance with the provision made by Section 77B for the payment of compensation for services rendered in proceedings under that Section. It does not follow, however, that Congress could not change the particular method by which such review might be obtained. Respondents have no vested right in any particular method of review, or, for that matter, in any review at all.

In the case of *Railroad Company* v. *Grant*, 98 U. S. 398, this Court ruled adversely to the contention of the defendant in the court below that, having been entitled to an appeal at the time of the entry of the judgment against it, it was not to be deprived of this right by a later act of Congress increasing the jurisdictional amounts necessary to obtain a review. This Court said at page 401:

"The act of 1879 is undoubtedly prospective in its

> operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

On this point see also: *Sherman* v. *Grinnell*, 123 U. S. 679; *National Bank of Baltimore* v. *Peters*, 144 U. S. 570.

If Congress could have taken away their right to review entirely, it can hardly be urged by respondents that Congress could not have changed the procedure by which they could have obtained a review. The application of Section 24 of the Chandler Act does not involve respondents' substantive rights. The only question here presented is whether respondents have complied with the statute by which a review could have been obtained.

In holding that the Chandler Act governed the appeal from the order involved in this case, the Court of Appeals rejected these contentions, which were there elaborately argued by respondents. The precise question here presented was also decided by the Court of Appeals for the Second Circuit in the case of *London* v. *O'Dougherty*, 102 F. (2d) 524. In holding that the Chandler Act governed an appeal from an order awarding compensation in proceedings under Section 77B entered after the effective date of the amendatory Act, the Court of Appeals for the Second Circuit said in that case, at page 525:

> "Section 276(c) (2), 11 U. S. C. A. § 676(c) (2), makes the provisions of Chapter 10 (including §250) applicable to such reorganization proceedings 'to the extent that the judge shall deem their application

practicable'; and 'judge' means only a 'judge of a court of bankruptcy', § 1(20), 11 U. S. C. C. § 1(20). Two alternatives are open; the judge may 'deem' application of the provisions of Chapter 10 'practicable' or 'impracticable' as a whole; or he may deal with them singly, the application of this one being 'practicable', and of that, not. Plainly the second is the right interpretation, since the 'practicability' of applying a provision depends upon what it requires; it would generally be impossible to say that all were, or all were not, 'practically' applicable. If the judge is to act upon the provisions singly, it would be quite impermissible for him to declare when it was practicable to apply § 250, which relates to appeals to this court: § 276(c) (2) cannot cover appeals. We therefore turn to § 6(b) of the Chandler Act itself, 11 U. S. C. A. § 1 note, which declares to what proceedings the amendments as a whole are applicable. That indeed is in substantially the same terms as § 276(c) (2), except that the determination is now ours, not the bankruptcy court's. Obviously, it is entirely 'practicable' that § 24a shall determine the 'manner' of taking appeals. Hence we hold that no leave was necessary, the appeal being of right."

By the statement that "the determination is now ours, not the bankruptcy court's", the court did not imply, as respondents argue, that the application of Section 24 of the Chandler Act is discretionary with the circuit courts of appeals. What the court plainly meant by this statement is that a decision as to whether the application of Section 24 of the Chandler Act is "practicable" within the meaning of Section 6b of the amendatory Act must be made by the appellate court and not by the bankruptcy court.

Therefore, it plainly appears that an appeal from the order of October 26, 1938, could have been taken by respondents only in accordance with Sections 24 and 25 of the Chandler Act, which were in force at the time of the entry of this order, and had been in force for more than one month prior thereto.

II.

THE COURT OF APPEALS HAD NO JURISDICTION TO ALLOW AN APPEAL FROM THE ORDER AWARDING COMPENSATION TO RESPONDENTS.

The Court of Appeals holds that Section 250 of the Chandler Act vests exclusively in the circuit courts of appeals appellate jurisdiction over the allowance of appeals from orders making or refusing to make allowances of compensation or reimbursement for expenses. The appellate jurisdiction thus conferred is held to be in addition to that conferred on the circuit courts of appeals by Section 24 of the Chandler Act. In aid of this construction of the Chandler Act, the Court of Appeals applies to Section 250 the maxim *generalia specialibus non derogant* (R. 52).

This maxim is not apposite. Appellate jurisdiction is vested in the circuit courts of appeals by Section 24. This jurisdiction is, in respect of the allowance of appeals, limited to orders involving less than $500. Section 250 does not enlarge, restrict, or in any manner modify, the appellate jurisdiction vested in the circuit courts of appeals by Section 24, or nullify this limitation.

Section 24b provides that the appellate jurisdiction conferred on the circuit courts of appeals by Section 24a "shall be exercised by appeal and in the form and manner of an appeal". Except as otherwise provided by the Bankruptcy Act, appeals from orders of the bankruptcy courts are required to be taken in the District Court, formerly upon the allowance of an appeal,[4] and now, under the

[4] Rules in Bankruptcy, General Order XXVI; Judicial Code, 28 U. S. C. § 230; *O'Connor* v. *Mills*, 300 U. S. 26; *Ross* v. *White* (C. C. A. 6th Cir.) 32 F. (2d) 750, certiorari denied 280 U. S. 584; *McBee* v. *Palmer* (C. C. A. 9th Cir.) 73 F. (2d) 342; *United States* v. *New National Coal & Mining Co.* (C. C. A. 7th Cir.) 72 F. (2d) 168; *Alaska Packers* v. *Pillsbury*, 301 U. S. 174.

Rules of Civil Procedure for the District Courts, by the filing of a notice of appeal.[5] Appeals are required to be taken in the trial court, and an appellate court has no jurisdiction to allow appeals unless authorized to do so by statute (*Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258; *Fowler* v. *Hamill*, 139 U. S. 549). Section 24 confers jurisdictions upon the circuit courts of appeals to allow appeals from orders of the bankruptcy courts and, at the same time, limits this jurisdiction to orders involving less than $500. This result is accomplished by use of a proviso. The proviso excepts from the general operation of Section 24, as a class, orders, decrees or judgments which involve less than $500, and provides a special rule of law to govern this class. The proviso is not limited in its effect to Section 24, or to the liquidation provisions of the Chandler Act (Chapters I-VII), but applies generally to all orders, decrees or judgments of the bankruptcy courts of this class. This clearly appears from the position of the proviso in Section 24. The proviso restrains and modifies the grant of appellate jurisdiction conferred upon the circuit courts of appeals by Section 24a and not the form and manner in which such appellate jurisdiction may be exercised, which Section 24b provides shall in all cases be by appeal. This interpretation follows the general rule for the construction of provisos. This Court said, in *Wayman* v. *Southard*, 10 Wheat. 1, at page 30:

> "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause."

[5] Rules in Bankruptcy promulgated January 16, 1939, General Order 36; Act of June 19, 1934, 28 U. S. C. A. § 723 b. and c.; Rules of Civil Procedure for the District Courts of the United States, promulgated December 20, 1937 and effective September 16, 1938, Rule 73.

Again in *McDonald* v. *United States*, 279 U. S. 12, this Court said, at pages 20-21:

> "As a general rule, a proviso is intended to take a special case or class of cases out of the operation of the body of the section in which it is found (citing cases). But a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used."

In *United States* v. *Babbit*, 1 Black 55, this Court, after stating that it is a well recognized rule of statutory construction that all statutes relating to the same subject matter shall be considered together, said at page 61:

> "We are of opinion that the proviso referred to *is not* limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all * * * of this class."

It is a rule of statutory construction that single sentences or single provisions of a statute are not to be selected and construed by themselves, but the whole statute is to be taken together and all of the parts harmonized. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. And a construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain language of the statute. (*United States* v. *Raynor*, 302 U. S. 540, 547; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Early* v. *Doe*, 16 How. 610, 617; *Pollard* v. *Bailey*, 20 Wall. 520, 525.)

In construing Section 21 of the Bankruptcy Act of 1867, this Court said in the case of *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, at page 662:

> "Difficulties perhaps insurmountable would attend the theory of the plaintiffs if the twenty-first section

> of the Bankruptcy Act stood alone; but it does not stand alone; and, being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency."

Section 24 of the Chandler Act gives an aggrieved party an absolute right to an appeal from any order, judgment or decree which involves $500 or more, and Section 250 of the Chandler Act should not be so construed as to destroy this right unless the language of that Section permits of no other construction.

In *Talbott* v. *Silver Bow County*, 139 U. S. 438, this Court said, at pages 443-4:

> "Further it is a general rule in the construction of statutes that where in the earlier and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections; and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges; but these subsequent sections will be understood, (unless there be words of restriction and limitation therein,) as coextensive with and applicable to the scope, and the full scope, and extent of the powers theretofore granted."

And in *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, this Court stated, at page 325, that the provision of various sections of an act "being in *pari materia* required harmonious construction and therefore they should not be applied so that one section destroyed the others", and, at page 326, recognized "the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another".

Section 250 of the Chandler Act regulates in some particulars the procedure on appeal by providing that appeals shall be "summarily heard upon the original papers". It does not purport to confer appellate jurisdiction upon the circuit courts of appeals. It does not provide for "the manner" of appeal, but, on the contrary, declares that the manner of appeal has been provided for elsewhere in the Act and that appeals from orders allowing or refusing to allow compensation or reimbursement shall be taken and allowed in the same manner.

The language, "Appeals may be taken * * * from orders making or refusing to make allowances * * * and may * * * be taken to and allowed by the circuit courts of appeals * * *", is sufficiently broad to cover both methods of appeal provided for by Section 24. The words, "taken to and allowed by", alone, are sufficient for this purpose; but even if these words be construed in the language of Section 24 to mean "taken * * upon allowance" by the circuit courts of appeals, effect must still be given to the earlier words of the Section, "Appeals may be taken". Upon either construction, both methods of appeal are included in the language of that Section. Effect must also be given to the words "in the manner and within the time provided for appeals by this Act". The reference here is undoubtedly to Section 24 as to the manner of appeal and to Section 25a as to the time for appeal. There seems to be no doubt of the incorporation of these sections by Section 250.

The construction placed upon Section 250 by the Court of Appeals ignores, in each of these respects, the language of that Section; it also ignores Section 5(b) of the amendatory Act (52 Stat. 940) which provides that: "Sections and subdivision headings shall not be taken to govern or limit the scope of the sections or subdivisions to which they relate."

The Court of Appeals also ignores the construction of subdivision (c) (9) of Section 77 B by the courts. Section 250, being substantially a re-enactment of this subdivision, should receive the same construction. Although subdivision (c) (9) declared that appeals from orders fixing allowances might be "taken to the Circuit Court of Appeals independently of other appeals", it was uniformly held that appeals from these orders could be taken only as provision had been made for appeals by Section 24(b). (*Shulman* v. *Hotel Co.*, 301 U. S. 172; *In re Wilson-Sheridan Hotel Co.* (C. C. A. 7th Cir.) 86 F. (2d) 898; *In re New York Investors* (C. C. A. 2d Cir.) 79 F. (2d) 179; *Dee* v. *United Exchange Bldg.* (C. C. A. 9th Cir.) 88 F. (2d) 372; *In re Grocery Center* (C. C. A. 7th Cir.) 91 F. (2d) 176.) The reference contained in Section 250 to other sections of the Act as to the provisions made for the manner and time of appeal is an express adoption of this construction.

In *London* v. *O'Dougherty*, 102 F. (2d) 524, the Circuit Court of Appeals for the Second Circuit held that Section 250 necessarily incorporates Section 24 (page 525):

> "The question raised by this motion is whether one must secure the leave of this court to appeal from an order awarding him too small an attorney's allowance in a reorganization under the Bankruptcy Act. Section 24a, 11 U. S. C. A. Sec. 47(a), requires leave only in case the order 'involves less than $500', and if it governs this appeal, no leave was therefore necessary, for the appellant asked more than $500. However, appeals from allowances are directly governed by § 250, 11 U. S. C. A. § 650, which provides that 'appeals may be taken in matters of law or fact' from such orders, 'and may, in the manner and within the time provided for appeals by this Act [title], be taken to and allowed by the circuit court of appeals'. This language necessarily incorporates the provisions of § 24a as to the 'manner' of taking an appeal, which need not be 'allowed' by us, but lies as of right."

This same opinion was entertained by the Court of Appeals when it denied petitioner's petition for the allowance of an appeal in Case No. 6822 (R. 49). As stated in its memorandum opinion filed December 19, 1938:

> "Under Section 24(a) of the amended Act (Title 11 U. S. C. A. 47), however, it seems definite that the allowance of an appeal by this court is permissible only when there is less than $500 involved."

The construction of the Chandler Act by the Court of Appeals not only contravenes its positive provisions and the rules of construction which have hereinbefore been mentioned, but also violates its policy and spirit.

Under the Bankruptcy Act of 1898, as originally enacted, Section 24 provided (a) for review of "controversies arising in bankruptcy proceedings" as "in other cases" and (b) for review of "proceedings of the several inferior courts of bankruptcy" by petition to superintend and revise in matters of law (July 1, 1898, c. 541, Sec. 24; 30 Stat. 553). Section 25(a) provided for appeals "in bankruptcy proceedings" from a judgment (1) adjudging or refusing to adjudge a defendant a bankrupt, (2) granting or denying a discharge or (3) allowing or rejecting a debt or claim of $500 or over, to be taken "as in equity cases" within ten days from the date of the judgment (July 1, 1898, c. 541, Sec. 25; 30 Stat. 553).

No uniformity existed: as between these provisions for appellate review, the time for taking appellate proceedings, the method of obtaining appellate review, and the scope of review, all differed. In "controversies arising in bankruptcy", the time, method, and scope of review, as "in other cases", were governed by the provisions of judicial code. (*Mitchell Store Building Co.* v. *Carroll*, 232 U. S. 379, 381.) The time for taking proceedings for review by appeal, as "in other cases", was then six months.

(*Lazarus* v. *Prentice*, 234 U. S. 263; *Globe Bank* v. *Martin*, 236 U. S. 288, affirming *In re Martin* (C. C. A. 6th Cir.) 201 Fed. 31.)[6] In "proceedings" in bankruptcy, review was by petition to superintend and revise and was limited to matters of law, except in the cases enumerated in Section 25(a). No definite time was fixed within which petitions to superintend and revise were required to be filed; but the time for filing these petitions was either fixed by rules adopted by the appellate court, or limited by analogy to the time prescribed for the taking of appeals. (*In re Worcester County* (C. C. A. 1st Cir.) 102 Fed. 808; *Kenova Loan & Trust Co.* v. *Graham* (C. C. A. 4th Cir.) 135 Fed. 717; *Blanchard* v. *Ammons* (C. C. A. 9th Cir.) 183 Fed. 556; *In re Inter-City Trust* (C. C. A. 1st Cir.) 295 Fed. 495; *American Range & Foundry Co.* v. *Mercantile Trust Co.* (C. C. A. 8th Cir.) 7 F. (2d) 417.) Review of "proceedings" in bankruptcy, as to the cases enumerated in Section 25(a), was by appeal, which was required to be taken within ten days.

These sections were amended by the Act of May 27, 1926 (c. 406, Secs. 9, 10; 44 Stat. 664, 665), to provide for review in all cases by appeal and to fix and limit the time for appeal in all cases to thirty days. Appeals in "proceedings" in bankruptcy, except in the cases enumerated in Section 25(a), however, were permitted to be taken only upon allowance by, and in the discretion of, the appellate court. The scope of review remained unchanged. Some progress toward uniformity in matters of review was made by these amendments.[7]

As thus amended, these sections continued in force until

[6] The time for taking appeals in equity cases generally was changed in 1926 to three months. Jud. Code, 28 U. S. C. § 230.

[7] See Report of the Special Committee on Practice in Bankruptcy Matters, Reports of American Bar Association, 1925, Vol. L, pages 485-486; 40 Harvard Law Review at pp. 343-344.

the effective date of the Chandler Act amendments. The evident purpose of the Chandler Act amendments was to give even greater uniformity to the provisions for review.

Section 24a of the Chandler Act eliminates entirely the distinction, as respects the manner of appeal, between orders in "controversies arising in bankruptcy proceedings", and orders in "proceedings of the several inferior courts in bankruptcy", which existed under sub-sections (a) and (b) of former Section 24. The proviso that an appeal from an order which involves less than $500 may be taken only upon an allowance by the appellate court applies both to "proceedings" and to "controversies". (*In re Winton Shirt Corporation* (C. C. A. 3d Cir.) 104 F. (2d) 777: *England* v. *Ducasse* (C. C. A. 9th Cir.) 104 F. (2d) 760.) Section 24(a) also eliminates any differences theretofore existing as to the scope of review by providing for review of both the facts and the law in all cases.

While Section 24 of the Chandler Act does not expressly declare that the allowances of appeals from orders involving less than $500 are discretionary with the circuit courts of appeals, the intent of Section 24 is clearly to permit appeals from orders which involve $500 or more to be taken as of right in the District Court and appeals from orders involving less than $500 to be taken only in the discretion of the circuit court of appeals. In other words, the right of appeal is made to depend entirely upon the amount involved. This is an adoption of the rule which governed appeals from a judgment allowing or rejecting a debt or claim under former Section 25(a). (*In re Winton Shirt Corporation* (C. C. A. 3d Cir.) 104 F. (2d) 777.) Under former Section 25(a) appeals were taken as of right when the judgment allowing or disallowing a debt or claim involved $500 or over; but when less than $500 was involved, the judgment was reviewable only in

the discretion of the circuit court of appeals. The purpose of restricting the right of appeal from a judgment involving a claim or debt of less than $500 was, as stated by Mr. Justice Van Devanter, then sitting as a judge of the Circuit Court of Appeals for the Eighth Circuit, in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. 344, at page 347:

> "The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy."

The same purpose of Congress is evident in the restriction placed upon the right of appeal by Section 24 of the Chandler Act. But, when more than $500 is involved, whether it be a question of allowance of fees, reimbursement for expenses, or some other question, Congress evidently intended that the right of appeal shall be absolute. Nothing contained in Section 250 discloses a contrary or different intent.

In its present opinion, the Court of Appeals holds that it is the intent of Section 250 to retain the distinction between "proceedings" and "controversies" which existed under former Sections 24 and 25 with respect to orders fixing compensation or reimbursement. The principal reason advanced by the Court of Appeals is that this interpretation will further a more expeditious administration, which Congress must be presumed to have intended (R. 58-59). Nowhere in the Chandler Act does there appear an intent to restrict the right of appeal except as to orders which involve less than $500. Surely, if Congress had intended to restrict the right of appeal from orders fixing allowances of compensation or reimbursement, Congress would have experienced no difficulty in expressing this purpose in appropriate and unequivocal language, and pre-

sumably would have done so. The intent of Congress clearly was to make uniform the heterogeneous provisions theretofore existing with respect to appellate review of orders of the bankruptcy courts. Nor does the construction placed upon Section 250 by the Court of Appeals further a more expeditious administration.

Allowances of compensation usually cannot be made until a plan of reorganization is approved, or some other disposition is made of the proceedings, for, until then, an evaluation of the services which have been or which may thereafter be rendered is impossible. When this point is reached, the District Court can and will fix the amount of compensation and terms of payment with due regard to the value of the services, to the ability of the estate or of the reorganized corporation to pay, and to the plan of reorganization, if one has been approved. It is extremely improbable that appeals from orders relating to compensation could impede the proceedings or would be likely to do so.

Certainly, greater danger to the expeditious disposition of these proceedings lies in appeals from other orders which under Section 24 of the Chandler Act may be taken as a matter of right. And if Congress had believed that appeals would vexatiously and unnecessarily obstruct the speedy conclusion of proceedings in the bankruptcy courts, it would not have extended the time for appeal (and for leave to appeal) to forty days, as it did under Section 25a of the Chandler Act (52 Stat. 855, 11 U. S. C. A., Sec. 48a; Cf: 11 U. S. C. Secs. 47(c); 48(a)).

But the danger of delay by appeals from orders relating to compensation and reimbursement, if it exists, is removed by the provision in Section 250, that appeals "shall be summarily heard upon the original papers". Less time is lost in obtaining a summary hearing upon the original papers than in preparing and filing a petition for the allowance

of an appeal and supporting brief, which may not be acted upon for some time, and, if allowed, will result in further delay. Particularly is this true when the scope of review under the Chandler Act has been broadened to include a review of the facts as well as the law on appeals from these orders.

III.

THE COURT OF APPEALS SHOULD HAVE DISMISSED THE APPEAL WHICH IT ALLOWED TO RESPONDENTS FOR WANT OF JURISDICTION TO ENTERTAIN IT.

Compliance with the provisions of Sections 24 and 25 of the Chandler Act was necessary to perfect an appeal from the order of October 26, 1938, and to confer jurisdiction on the Court of Appeals to entertain the appeal. The Court of Appeals has no discretion to entertain an appeal which has not been taken in the manner authorized by law. Compliance with the statute is jurisdictional.[8]

The appeal from the order involved in this case could have been taken only in the District Court, and not having been so taken, the Court of Appeals should have dismissed the attempted appeal for want of jurisdiction to entertain it.[9] The decision with respect to judgments allowing or rejecting a debt or claim under former Section 25(a) are applicable here. Under former Section 25(a) when the

[8] *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160; *O'Connor* v. *Mills*, 300 U. S. 26; *Shulman* v. *Hotel Co.*, 301 U. S. 172; *Matter of Loving*, 224 U. S. 183; *Coder* v. *Arts*, 213 U. S. 223; *Union Nat. Bank* v. *Lehmann-Higginson Grocery Co.* (C. C. A. 10th Cir.) 82 F. (2d) 969; *McBee* v. *Palmer* (C. C. A. 9th Cir.) 73 F. (2d) 342; *United States* v. *New National Coal & Mining Co.* (C. C. A. 7th Cir.) 72 F. (2d) 168; *Ross* v. *White* (C. C. A. 6th Cir.) 32 F. (2d) 750; *In re Glazer's, Inc.* (C. C. A. 2nd Cir.) 66 F. (2d) 513. See also: *Alaska Packers* v. *Pillsbury*, 301 U. S. 174; *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258; *Brooks* v. *Norris*, 11 How. 204; *United States* v. *Curry, et al.*, 6 How. 106; *Pierce* v. *Cox*, 9 Wall. 786; *Barrel* v. *Transportation Co.*, 3 Wall 424.

[9] See cases cited in Footnote 8.

judgment involved $500 or more an appeal therefrom could be taken only in the District Court, and when less than $500 only upon allowance by the circuit court of appeals.[10]

Formerly appeals were taken in the District Court only upon allowance,[11] but now appeals are taken under the Rules of Civil Procedure for District Courts by the filing of a notice of appeal in the District Court.[12] Respondents have not followed either procedure: they neither secured the allowance of an appeal in the District Court, nor filed a notice of appeal in the District Court. Respondents, however, argue in this Court, and for the first time, that the procedure followed by them in the Court of Appeals was substantially the equivalent of the filing of the notice of appeal in the District Court, and that their appeal was, therefore, properly taken even though the Court of Appeals had no jurisdiction to allow the appeal. In support of this contention, respondents cite *Crump* v. *Hill*, 104 F. (2d) 36; *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83; *Martin* v. *Clarke*, 105 F. (2d) 685; and *Siegel* v.

[10] *Matter of Loving*, 224 U. S. 183 (Claim over $500: no jurisdiction to review on petition to revise); *In re Glazer's, Inc.* (C. C. A. 2nd Cir.) 66 F. (2d) 513 (Claim over $500: no jurisdiction to review on petition to revise); *Bear, et al.* v. *Liberty Nat. Bank of Roanoke, Va.* (C. C. A. 4th Cir.) 285 Fed. 706 (Claim over $500: petition to revise dismissed); *Union Nat. Bank of Kansas City, Mo.* v. *Neill* (C. C. A. 5th Cir.) 149 Fed. 720 (Claim over $500: petition to revise dismissed); *In re Mueller* (C. C. A. 6th Cir.) 135 Fed. 711 (Claim over $500: petition to revise dismissed); *Abercrombie* v. *Brinkman* (C. C. A. 4th Cir.) 293 Fed. 375 (Claim under $500: petition to revise sustained); *Cook Inlet Coal Fields Co.* v. *Caldwell* (C. C. A. 4th Cir.) 147 Fed. 475 (Claim over $500: reviewable only by appeal); *Gray* v. *Grand Forks Mercantile Co.* (C. C. A. 8th Cir.) 138 Fed. 344 (Claim under $500: appeal dismissed. See also: *England* v. *Ducasse* (C. C. A. 9th Cir.) 104 F. (2d) 760 (Claim over $500: petition for leave to appeal denied).

[11] See Footnote 4.

[12] See Footnote 5.

Margiotta, 102 F. (2d) 525. (Brief for Respondents in Opposition to Petition for Writ of Certiorari, pp. 21-24.)

In the *Crump* case, the Court of Appeals for the Fifth Circuit held that the papers that appellant filed in the District Court in apt time were, in substance, a notice of appeal.

In the *Ainsworth* case, the Court of Appeals for the Third Circuit held that the filing of the record in the circuit court of appeals within 40 days was not jurisdictional, but that the failure to comply with Rule 73 in this respect merely furnished the basis for such action as the circuit court of appeals might deem appropriate.

In the *Martin* case, the Court of Appeals for the Seventh Circuit held that a notice of appeal filed in the District Court in apt time was not invalidated by a misdescription of the judgment which was neither misleading nor prejudicial.

In the *Siegel* case, the Court of Appeals for the Second Circuit assumed, without deciding, that a motion for leave to appeal, filed in the circuit court of appeals, might be taken as the equivalent of a notice of appeal.

The foregoing cases are not authority for the proposition in support of which they are cited by respondents. The *Crump* and *Martin* cases involved mere questions of form and not of substance. In the *Ainsworth* case a notice of appeal was not in any way involved. In the *Siegel* case the assumption made by the court was unnecessary to its decision and cannot be construed as the deliberate judgment of the court.

Rule 73(a) of the Rules of Civil Procedure for District Courts provides:

> "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judg-

ment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Rule 5(e) provides:

"The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

The Rules of Civil Procedure definitely require the filing of the notice of appeal in the District Court and make the filing of the notice of appeal jurisdictional. This requirement is emphasized by the express provision that the failure to take any further steps shall not affect the validity of the appeal, clearly demonstrating that the filing of the notice of appeal in the District Court is the effective act by which the appellate jurisdiction of the circuit court of appeals is invoked. Notification of the filing of the notice of appeal is not jurisdictional. Under Rule 73(b) it is the duty of the clerk to notify the parties to the judgment by mailing copies of the notice of appeal, but it is expressly provided that "his failure so to do does not affect the validity of the appeal". If it should appear that parties to the judgment have not been notified of the filing of the notice of appeal, the appellate court has authority under Rule 73(a) to issue citations, or in some other manner to notify the absent parties. Likewise the appellate court has authority to deal, in an appropriate manner, not inconsistent with the Rules, with all other matters of procedure following the filing of the notice of appeal. This disposes of

respondents' contention that the essential requirement under the Rules of Civil Procedure is the notification to the parties that an appeal has been, or is about to be, taken from a judgment of the District Court. Such notice is not a substitute for the filing of the notice of appeal in the District Court within the time prescribed by law. It is doubtful whether respondents' petition for leave to appeal can be construed as a notice of appeal. But even if it should be so construed, it was not filed in the District Court but in the Court of Appeals (R. 34). To permit a notice of appeal to be filed in a court other than in the District Court in which the judgment was rendered would lead to endless confusion, and certainly such practice is neither contemplated nor authorized by the Rules of Civil Procedure. The Rules—and orderly procedure—require that the notice of appeal be filed in the District Court from whose judgment the appeal is to be taken. It is difficult to imagine, and it is unnecessary to dwell upon, the confusion which would result from the adoption of any other rule.

Review by notice of appeal had been adopted in many of the jurisdictions within the United States prior to December 20, 1937, the date on which this Court promulgated the Rules of Civil Procedure for District Courts of the United States. The jurisdictional requirements for perfecting an appeal in each of these jurisdictions are by no means identical. In addition to the filing of the notice of appeal, some jurisdictions require service of copies of the notice of appeal or written notification of the filing of the notice of appeal, the filing of proof of service of such notice, the approval of an appeal bond, etc, etc., and prescribed the time within which such steps must be taken, all or some of which requirements are held to be jurisdictional. In promulgating Rule 73 this Court decreed that the filing of the notice of appeal should be the sole

jurisdictional requirement, and that further steps in securing the review should be merely procedural. Under Rule 73, the service of a notice, which is a mere matter of procedure, cannot be substituted for the jurisdictional requirement of the filing of the notice of apeal in the District Court. (See *Brown* v. *McConnell*, 124 U. S. 489, 491; *Dodge* v. *Knowles*, 114 U. S. 430, 438.)

In *Laupahoehoe Sugar Co.* v. *Lalakea*, 27 Hawaii Reports 682, the Supreme Court of Hawaii said at page 687:

> "Under our statute, it is the filing in court of the notice of appeal which is the effective appellate act giving this court the power to review the particular decree complained of. The service of a copy of this notice, required by the Act of 1919, is not jurisdictional but is merely a matter of procedure."

It has also been held that a notice of appeal which has been filed in the wrong court is ineffective to invoke the appellate jurisdiction of the reviewing court. (*Rodriguez* v. *Rodriguez*, 32 Porto Rico 618; *Haas* v. *Weinhagen*, 30 Wis. 326; *Mansfield* v. *O'Keefe*, 133 Cal. 362, 65 Pac. 825.)

And the notice of appeal cannot be deemed to be filed until it is delivered at the place where it is to be filed, to the proper officer, and by him received to be kept on file. (Rule 5(e); *Nevatt* v. *Kerby*, 45 Ida. 23, 260 Pac. 432; *W. J. White Co.* v. *Winton*, 41 Cal. App. 693, 183 Pac. 277).

Therefore, whether the Rules of Civil Procedure or the former practice be held to govern an appeal from the order involved in this case, it is clear that the appeal was not perfected.

Respondents argue further that equitable considerations require this Court to sustain the jurisdiction of the Court of Appeals. The point of this argument appears to be that if petitioner had promptly filed an answer to their

petition for leave to appeal, they might still have had time to take the necessary steps to perfect an appeal in the District Court. Reliance is placed upon Rule 38 of the Court of Appeals, which is quoted at length at pp. 3-4 of the brief filed by them in opposition to the granting of the writ herein.

Rule 38 applies to the allowance of appeals discretionary with the Court of Appeals and has no application to appeals which the Court of Appeals has no authority to allow. Further, Rule 38 provides that "respondent may file an answer and if so it must be under oath", and does not require an answer to be filed. The filing of the petition imposed no duty upon this petitioner to answer the petition. The allowance of an appeal is not intended to and does not preclude a later consideration of the right of the appellant to maintain its appeal if and when such right is called into question. (*Bitker* v. *Hotel Duluth Co.*, (C. C. A. 8th Cir.) 87 F. (2d) 207.) And the Court of Appeals should and will inquire into its jurisdiction whenever and however the same may be called in question. (*Swift & Co.* v. *Hoover*, 242 U. S. 107; *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379; *Morris* v. *Gilmer*, 129 U. S. 315; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *In re Garneau* (C. C. A. 7th Cir.) 127 Fed. 677; *In re Ettinger* (C. C. A. 2nd Cir.) 76 F. (2d) 741.)

Respondents' petition for leave to appeal was docketed November 25, 1938 (R. 34), which was on the *thirtieth* day following the entry of the order of October 26, 1938. Under Rule 38 respondents were not entitled to docket their petition for leave to appeal until a copy of the petition, assignment of errors, and brief in support of the petition were served upon petitioner and proof of such service filed with the petition. Copies of these papers were not served upon petitioner until the following day,

November 26, 1938 (R. 41). Having themselves violated Rule 38, respondents are hardly in a position to complain of any violation of that Rule by petitioner, even if such complaint were justified, which it is not.

The express provisions of the Chandler Act, or of the Rules of Civil Procedure, cannot be dispensed with upon equitable grounds. This Court, speaking through Mr. Chief Justice Taney, said in the case of *Saltmarsh* v. *Tuthill*, 12 How. 387, at page 389:

> "Nor is there any equitable power in the Circuit Court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial in this respect whether it was the mistake of the party or the court. For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of Congress regulating appeals and writs of error, upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States* v. *Curry and others*, 6 How. 113; and *Hogan and others* v. *Ross*, 11 Id. 297."

In the case of *Wingert et al.* v. *Smead et al.*, 70 F. (2d) 351, the Court of Appeals for the Fourth Circuit said at page 352:

> "A petition for rehearing in the above cases urges that technicalities be disregarded and that the appeals be entertained without regard to the fact that the statute which we think applicable has not been complied with. The answer to this is that compliance with the statute is jurisdictional. We have no discretion to entertain appeals which are not taken in accordance with the statute which gives us appellate jurisdiction. The petition for rehearing will be denied."

IV.

THE MERITS OF THE CONTROVERSY BETWEEN THE PETITIONER AND RESPONDENTS ARE NOT BEFORE THIS COURT.

The petition for certiorari and the record filed herein presented only the question of the jurisdiction of the Court of Appeals to allow and entertain the appeal from the order involved in this case. The merits of the controversy which existed between respondents and petitioner in the courts below are not presented to this Court for review. If it were not for the statements and arguments made by respondents in the brief filed by them in opposition to the granting of the writ herein, no statement in regard to the merits of the case would be required. Petitioner does not admit the justice of the allowance made to respondents by the Court of Appeals and states that the conclusions reached by the Court of Appeals are based upon a misapprehension of the facts, particularly with reference to what it termed "the outstanding advantages of the plan" (R. 52) and the services rendered by respondents in connection with these supposed "outstanding advantages".

CONCLUSION.

For the reasons assigned, it is respectfully submitted that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

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